The discovery in flagrante delicto, the Kafkaesque fate of a Supreme judge and the Turkish Constitutional Court: The Alparslan Altan case in Strasbourg

May 6, 2019 Guest Blogger Alparslan Altan v. Turkey, Right to Liberty and Security

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On 16 April 2019, the Second Section Chamber of the European Court of Human Rights (the ECtHR) delivered a long-awaited decision in the case of *Alparslan Altan v. Turkey* (https://hudoc.echr.coe.int/eng#{"itemid":["001-192804"]}), an application lodged by a former judge serving on the Turkish Constitutional Court (TCC) to challenge his arbitrary placement in pre-trial detention in the aftermath of the 15 July 2016 attempted coup. The application was pending in Strasbourg since 16 January 2017 (https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22altan%22%5D,%22documentcollectionid2%22:%5B%22COMMUNICATEDCASES%22%5D,%22178138%22%5D%7D). In its judgment, the ECtHR found that the applicant's initial pre-trial detention was not lawful within the meaning of Article 5/1 of the European Convention on Human Rights (ECHR) and was not based on reasonable suspicion that he had committed an offence under Article 5/1 (c) ECHR.

Some background information to the case and the key findings of the ECtHR will be pointed out and discussed below. However, in the comment section, I shall limit myself to focus on two points that I take as crucial in order to understand the significance of the judgment. The first point, as expected, deals with the content of the decision i.e. what the Court has said or not, and why this judgment matters. This is a relatively easy task as there is arguably only one aspect of the judgment that is open to criticism- that is the fact that the Court refrained from reviewing the prolonged nature of Altan's pre-trial detention. The second point concerns a broader question that perhaps goes beyond the particularities of the case and rekindles an old debate on whether the TCC is still an effective legal body domestically.

Background

Let me share this beforehand: I have now read the judgements/decisions/orders at the Turkish national level, including Alparslan Altan's individual application before the TCC several times. Each time I read them, I felt like I was re-reading some chapters from Franz Kafka's *The Trial*. In fact, there are many ways to liken Altan's case to the terrifying tale of Joseph K. They were both suddenly and inexplicably arrested with no evidence, both trapped as helpless pawns in the hands of powerful courts, both victims of political and legal injustice, and both had no effective remedy. The list could go on and on. Despite the dark and mysterious nature of the novel, I have also always found it to be a humorous story. The events in the novel are so unfortunate and gruesome, yet so natural and comical in details – just as the Kafkaesque particularities and circumstances of the Altan case.

Less than 24 hours after the bloody 15 July coup attempt, the Ankara Public Prosecutor office (rather surprisingly!) managed to open a criminal investigation in respect of members of the Turkish judiciary who allegedly had links to the Gülenist network- an organization known as FETÖ/PDY. Some 3,000 judges and prosecutors, including two judges of the TCC and more than 160 judges of the Turkish Court of Cassation and the Turkish Supreme Administrative Court, had been arrested and taken into police custody.

Alparslan Aslan was one of them. A criminal peace judge (magistrate court, *sulh ceza hakimliği*) later ordered his pre-trial detention along with thirteen other suspects on 20 July 2016 on the charge of being member of the FETÖ/PDY organization on the basis of Article 100 of the Turkish Code of Criminal Procedure (TCCP), notwithstanding the procedural guarantees afforded to members of the TCC under Article 16 and 17 of the TCC Law No. 6216 (https://www.anayasa.gov.tr/en/legislation/law-on-constitutional-court/).

In the meantime, on 21 July 2016 the Turkish government declared a state of emergency and lodged a derogation notice pursuant to Article 15 ECHR. On the basis of Article 3 of the first emergency-decree law after the declaration of the state of emergency, Decree No. 667 (https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168069661d), the TCC decided to dismiss Alparslan Altan (along with another judge Erdal Tezcan) from his post on 4 August 2016 (http://www.constitutionalcourt.gov.tr/inlinepages/press/PressReleases/detail/pdf/2016-12.pdf). It simply held that *"the information from the social circle"* and *"the common conviction of the remaining TCC judges"* indicated that they had links with the FETÖ/PDY organization making him no longer fit to practice his profession. (The Venice Commission found this decision to be based on a subjection persuasion (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e). For the human rights and rule of law implications of this decision, see this case note by Tarik Olcay (https://www.cambridge.org/core/journals/european-constitutional-law-review/article/firing-benchmates-the-human-rights-and-rule-of-law-implications-of-the-turkish-constitutional-courts-dismissal-of-its-two-members/3E10082DAA7AB593A97BF23130D2899C))

On 11 January 2018, the TCC unanimously rejected the individual application of Alparslan Altan (http://www.kararlaryeni.anayasa.gov.tr/Content/pdfkarar/2016-15586.pdf). In addressing the complaint about the lawfulness of the applicant's detention, the TCC unquestioningly deferred to the reasoning of the magistrate that ordered the pre-trial detention. In particular, it found that (a) the alleged offence of membership of an armed terrorist organization was an ordinary offence punishable under Article 314 of the Turkish Criminal Code and thus falling within the jurisdiction of the assize courts; (b) this offence is a continuing offence according to the Turkish Court of Cassation's recent-case law, in particular a leading judgment of 10 October 2017; (c) in light of the very specific circumstances of the 15 July attempted coup, this constitutes the factual and legal basis for a case of discovery in *flagrante delicto*. Also taking into account the evidence (statements of two anonymous witnesses, statement by a former TCC rapporteur, a number of messages exchanged via ByLock that included some references to a codename which was believed to used by the applicant, and a telephone line registered in the applicant's name), the TCC concluded that the order for the applicant's detention could be said to have been based on justifiable grounds and proportionate.

A bill of indictment was eventually was filed in respect of the applicant charging him with being a member of the FETÖ/PDY organization on 15 January 2018. Eventually on 6 March 2019 he was sentenced to eleven years and three months' imprisonment.

The Judgment

In its judgment, the ECtHR first examined the complaints in light of Turkey's derogation notice under Article 15 ECHR (paras. 71-75). In spite of the fact that the applicant's initial detention took place on 20 July 2016 – one day before the state of emergency took full effect – the Court accepted that the formal requirement of the derogation has been satisfied in the present case and that there was a public emergency threatening the life of the nation in line with the *Mehmet Altan* case (https://hudoc.echr.coe.int/eng?i=001-181862) of March 2018 (para. 71).

In examining the lawfulness of the applicant's pre-trial detention, the ECtHR first emphasized that the Turkish Court of Cassation had held in its leading judgment of 10 October 2017 that a suspicion – within the meaning of Article 100 of the CCP – of membership of a criminal organisation may be sufficient to characterise a case of discovery *in flagrante delicto* without the need to establish any current factual element or any other indication of an ongoing criminal act. It then ruled:

> "(T)his amounts to an extensive interpretation of the concept of discovery *in flagrante delicto*, expanding the scope of that concept so that judges suspected of belonging to a criminal association are deprived of the judicial protection afforded by Turkish law to members of the judiciary, including the applicant, a judge serving on the Constitutional Court and hence entitled to such protection under Law no. 6216. As a result, in circumstances such as those of the present case, this interpretation negates the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive." (para.114)

It highlighted that the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law in the present case are not only problematic in terms of legal certainty but also appear manifestly unreasonable. Accordingly, it found that the applicant's detention, did not take place in accordance with a procedure prescribed by law, as required by Article 5 (1) ECHR (para. 115). Moreover, it considered that such an extensive interpretation of the concept of *in flagrante delicto* could clearly not be regarded as an appropriate response to the state of emergency nor could it be justified by the special exigencies of the situation (paras. 118-119).

With regard to alleged lack of reasonable suspicion that the applicant committed an offence, the Court first underlined that its task in the present case is to ascertain whether there were sufficient objective elements at the time of the applicant's initial detention on 20 July 2016 to satisfy an objective observer that he could have committed the offence of which he was accused by the prosecuting authorities (para. 136). It noted, however, that the items of evidence were gathered long after the applicant's initial detention. Despite the fact that the applicant repeatedly drew the national courts' attention to this fact, arguing in particular that there was no concrete evidence that could justify his pre-trial detention, in its decision of 11 January 2018 the TCC did not address that argument at all when dismissing the individual application of the applicant. Likewise, the Turkish Government remained silent on the matter and did not submit any specific argument to counter the applicant's assertion on that point (para. 138). As for the magistrate that ordered the applicant's detention, the Court noted (para. 142) that

> "the magistrate sought to justify his decision simply by referring to Article 100 of the CCP and to the evidence in the file … without taking the trouble to specify the individual items in question, even though they concerned not only the applicant but also thirteen other suspects."

The Court eventually concluded that the evidence before it is insufficient to support the conclusion that there was a reasonable suspicion against the applicant at the time of his initial detention (para. 145). It furthermore held that the detention order based on a mere suspicion of membership of a criminal organization cannot be said to have been strictly required by the exigencies of the situation (para. 148).

A Brief Comment

As outlined above in the introduction, I will start with the first point. But first allow me to recap some aspects of the Turkish version of Kafka's nightmare (perhaps with some more tragicomic elements): A former Supreme judge gets arrested less than 24 hours after the attempted coup together with some other 3000 members of the judiciary (the question arises (http://www.platformpj.org/arrests-judges-prosecutors-turkey-violation-principle-flagrante-delicto/#post-1686-footnote-12) as to how the prosecution came up with that list in just one night!). Four days later he gets placed in a pre-trial detention by a criminal peace judge (not independent or impartial (https://www.icj.org/turkey-system-of-criminal-peace-judges-not-independent-or-impartial-says-new-joint-briefing-paper/), and similar to the anonymous and unfamiliar court in *The Trial*, these judgeships emerged only in 2014) who does not even bother to take a look at individual items of evidence and provides a complicated and convoluted decision in order to bypass the procedural guarantees that the judge normally should enjoy. The apex court of the country of which this judge was a member dismisses him based on subjective information (or gossip, according to Dilek Kuban (https://verfassungsblog.de/a-love-letter-from-strasbourg-to-the-turkish-constitutional-court/)) and moreover unanimously denies its former member the right to constitutional review (where is the High Court that Joseph K. never reached!?).

In light of the above, I believe the ECtHR delivered arguably the most important decision so far arising out of alleged violations in Turkey in the aftermath of the attempted coup on 15 July 2016. In finding violations, the ECtHR invalidated a common Turkish emergency practice, perhaps the most aberrant use of ordinary modes of legality for vindictive and egregious ends: an extensive, far-reaching interpretation of the discovery of *in flagrante delicto* based on a mere suspicion of membership of a criminal organization. As the ECtHR rightly and strongly emphasized, the difficulties facing Turkey in the post-coup period cannot provide a carte blanche under Article 5 ECHR to detain anyone without any verifiable evidence or information or without a sufficient factual basis (para. 147).

Perhaps, the only uncomforting aspect of the case lies in the fact that the ECtHR considered the Article 5/3 claim 'unnecessary to examine', having regard to its finding under Article 5/1 that Altan's pre-trial detention lacks reasonable suspicion that he had committed an offence. In doing so, the Court did not explain why it found it unnecessary to examine whether Altan's automatic prolongation of detention over thirty months (btw. 20 July 2016 to 6 March 2019) gives rise to a separate human rights violation. Such a finding under Article 5/3 ECHR would be of an added value, as holding individuals charged with terrorism offences in lengthy pre-trial detentions has become routine (https://freedomhouse.org/report/freedom-world/2019/turkey) in Turkey, raising concerns that its use has become a form of summary punishment (https://www.hrw.org/world-report/2019/country-chapters/turkey).

Overall, the findings of the ECtHR in this case not only send strong signals regarding the way the arrests and detentions took place in the early aftermath of the failed coup, but will also have implications for all judges and prosecutors that had been arrested and detained.

What's more, juxtaposting the ECtHR findings in the Alparslan Altan case with what the TCC found in his individual application reveals a stark contrast. In other words, the ECtHR strongly and completely disagreed with all of the TCC findings on almost all points. Just like Kafka's protagonist had never reached the High Court, Alparslan Altan's claims indeed never genuinely reached the TCC, which declared them 'manifestly ill founded'. The Kafkaesque fate of a Supreme judge and the TCC's total restraint indeed reflect the current state of the rule of law in Turkey, the implications of which reach far beyond the particularities/circumstances of the Altan case.

This leads me to my second point. The Alparslan Altan case clearly marks the latest chapter in the long discussion whether the individual complaint mechanism of the TCC still provides an effective remedy for the alleged violations in Turkey, particularly, in the aftermath of the attempted coup on 15 July 2016. It is true that the TCC had issued a number of landmark freedom-serving decisions in the good old days, especially around late 2013-early 2014 when the individual application mechanism started to be fully implemented. As early as July 2014, the ECtHR recognized the TCC's individual application mechanism as effective for complaints *inter alia* concerning unlawful detention in the precedent setting case of *Koçintar v. Turkey (https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUIKEwiciZyX0obiAhW8wsQBHVE6DzAQFjAAegQIBBAC&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2*

9958%26filename%3D002-9958.pdf%26TID%3Dihgdqbxnfi&usg=AOvVaw0ZrCFv8NYYZbr7aNw873n-). But as I argued elsewhere (https://www.ejiltalk.org/has-the-european-court-of-human-rights-turned-a-blind-eye-to-alleged-rights-abuses-in-turkey/), those decisions were unreliable predictors of how or whether the TCC would perform similarly meaningful legal review in assessing alleged rights violations in the context of state of emergency. Moreover, as I also discussed here on this blog (https://strasbourgobservers.com/2017/08/02/the-koksal-case-before-the-strasbourg-court-a-pattern-of-violations-or-a-mere-aberration/), the total abdication by the Turkish courts show that the problem might and should be regarded as more wide ranging and fundamental than a failure to obtain relief at the national level, including before the TCC.

Unsurprisingly, the TCC kept sending increasingly contradictory signals during the past three years. Here is the most salient example: while the entire international community has been trying to praise the TCC when it issued its acclaimed decision ordering the release of Mehmet Altan on 11 January 2018, the fact that the same court rather silently rejected the application of Alparslan Altan on the same day seemingly fell of the radar and have gone virtually unnoticed. Nevertheless, in the Mehmet Altan case, the ECtHR did not depart from its 2014 precedent that the right to lodge an individual application with the Constitutional Court constitutes an effective remedy. (At the end, it was quite busy trying to resuscitate (Senem Gürol (https://strasbourgobservers.com/2018/04/03/resuscitating-the-turkish-constitutional-court-the-ecthrs-alpay-and-altan-judgments/)) the TCC or sending a love letter (D. Kuban (https://verfassungsblog.de/a-love-letter-from-strasbourg-to-the-turkish-constitutional-court/)) to it.) Not surprisingly, the ECtHR once again in the Alparslan Altan case managed to evade the inevitable conclusion that the individual complaint mechanist before the TCC is markedly ineffective.

In conclusion, while the ECtHR did what was expected of it by delivering some sort of justice to a former TCC judge in the Alparslan Altan case, the same cannot be said when it comes to its consistent rejection of the valid argument that the TCC has lost its impartiality. For this reason, the Alparslan Altan case is another missed opportunity for the ECtHR. Even if it decides to seize on another opportunity soon, this will require a serious consideration of the broader political context and a full examination of the substance of the allegations of large-scale human rights violations – things that have never really been the ECtHR's *forte*, I am afraid.